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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JUAN MANUEL LOPEZ-HERRERA,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Case Nos. 08cv1265 BEN
07cr0345 BEN

**ORDER DENYING § 2255
MOTION**

INTRODUCTION

Petitioner Juan Manuel Lopez-Herrera moves pursuant to 28 U.S.C. § 2255. Petitioner requests a downward departure in his sentence based on his acceptance of a final deportation order following completion of his sentence and challenges Bureau of Prisons policies which preclude him from participating in certain pre-release programs. Dkt. No. 28. Because, as discussed below, he waived the right to challenge his sentence, and his Equal Protection argument lacks merit, the Court **DENIES** the motion.

DISCUSSION

I. Waiver

The Ninth Circuit recognizes strong public policy considerations justifying the enforcement of a defendant's waiver of his right to appeal or collaterally attack a judgment. *United States v. Novarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). Waivers play an important role in the plea bargaining process and help ensure finality. *Id.* at 322. Generally, courts enforce a defendant's

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1 waiver of his right to appeal, as long as the waiver was “knowingly and voluntarily made” and
 2 “encompasses the defendant’s right to appeal on the grounds claimed on appeal.” *United States v.*
 3 *Nunez*, 223 F.3d 956, 958 (9th Cir. 2000) (quoting *United States v. Martinez*, 143 F.3d 1266, 1270-
 4 71 (9th Cir. 1998)).

5 Petitioner waived his right to collaterally attack his sentence in his plea agreement and at
 6 his sentencing before this Court. Govt. Opp’n, Ex. B, ¶ XI; Ex. D at 15. The plea agreement states
 7 that “[i]n exchange for the Government’s concessions in this plea agreement, defendant waives, to
 8 the full extent of the law, any right to appeal or to collaterally attack the conviction and sentence.”
 9 Ex. B, ¶ XI. Petitioner’s knowing and voluntary waiver of his right to collaterally attack his
 10 sentence requires denial of his § 2255 motion.

11 **II. Equal Protection**

12 Petitioner filed the present motion under 28 U.S.C. § 2255, but his Equal Protection
 13 challenge to the constitutionality of certain Bureau of Prisons policies is better construed as a
 14 challenge to the manner in which his sentence is being executed under 28 U.S.C. § 2241. *See*
 15 *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000) (per curiam) (instructing that petitions
 16 challenging the “manner, location or conditions of a sentence’s execution must be brought
 17 pursuant to § 2241”); *see also Montano-Figuero v. Crabtree*, 162 F.3d 548, 549 (9th Cir. 1998)
 18 (illustrating that challenges to Bureau of Prisoners policies are challenges to the execution of an
 19 inmate’s sentence). Construing his motion liberally, the Court considers Petitioner’s Equal
 20 Protection claim under 28 U.S.C. § 2241. *See Zichko v. Idaho*, 247 F.3d 1015, 1020 (9th Cir.
 21 2001) (noting a court’s “duty to construe pro se pleadings liberally”).

22 Petitioner claims that the Bureau of Prisons policy preventing him from participating in
 23 certain programs or being housed in certain facilities due to his alien status violates his right to
 24 Equal Protection. However, Bureau of Prisons policies preventing deportable aliens from
 25 participating in certain programs survive constitutional challenge. *Cf. McLean v. Crabtree*, 173
 26 F.3d 1176, 1186 (9th Cir. 1999) (finding BOP exclusion of prisoners with detainers, including INS
 27 detainers, from community-based program based on petitioners’ alien status did not violate Equal
 28 Protection).

Petitioner's motion is **DENIED**. The Clerk shall close case number 08cv1265 BEN.

DATED: January 26, 2011

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